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Q & A from "Crossing the Gray Line: Deep Review and New Developments" Webinar, February 2021

QUESTION	ANSWER
What is bright line of an existing enforceable obligation to sell? When is an agreement to sell binding? **My understanding is state laws differ on these questions.**	State laws definitely differ as to a legally binding contract - but usually it is when the charity is compelled to sell to the purchaser. Each case depends on its facts and circumstances, but the question always is, if one of the parties tried to back out, would the other party have an action for damages or even specific performance. At some point in any negotiation the answer to that question becomes "yes." The issue here is whether that moment has already arrived at the time the transfer to the exempt org is made.
Scenario - rental property with no debt for CGA. **Is "nothing in writing" a hard and fast rule for passing the NO pre-arrangement sale?**	Yes - oral negotiations are not legally binding in every state that I am aware of. This is covered in each state by something called "the statute of frauds," which makes certain agreements unenforceable unless they are in writing. These are fairly uniform from state to state, and transfers of real property are among the items specified. However, there is an exception: where there has been "partial performance" by one of the parties, the agreement may be enforceable. In the particular case, renovations to the property, rezoning efforts, etc. The idea is analogous to the "equitable estoppel" cases we discussed.

Dickinson emphasized that the question in Palmer is "whether the redemption and the shareholder's corresponding right to income had already crystallized." **This sounds very similar to a realization event. Do you think the question can be restated that clearly...has a realization event occurred?**	From the Tax Court's perspective, that is indeed the question. Their analysis is, or has been, whether the donor is assigning an existing right to income (or gain). IRS has been pushing for an approach that recognizes the purchaser's right to enforce. In the particular case of Dickinson, the only scenario in which the shareholder would have an existing right to income is if the board called the stock. Nothing in the restrictive stock agreement would have required the corporation to respond to a tender. What IRS was arguing in effect was that a transfer that violated the stock restriction triggered a requirement to tender.
How do you think Fidelity Charitable's fiduciary duty to act in the best interest of itself as a charity outweigh any responsibility to donor's wishes or promises made to the donors?	I am tempted to say it "absolutely" outweighs. We do not yet have formal regulations, but Notice 2006-109 cites by analogy regulations concerning grantmaking by private foundations, including expenditure responsibility. The fact that a contribution to a DAF is subject to the higher deduction limits available for gifts to 170(b)(1)(A) charities implies that the donor should not have controls similar to those she would have over a contribution to a private foundation. But even if she did, she would still be subject to expenditure responsibility. But of course in practice the fund sponsors are also cultivating relationships with their donors.
I may have missed it in this section - but was an existing buy/sell agreement approached? **Specifically, where a future buyer's name is prescribed, but no specific terms, and it's prior to a purchase/sale agreement.** **That's a situation where a future buyer or the company cannot force a sale or**	Generally, as long as the buyer could not force the charity to sell... basically no call provision if you will. We did not cover that specific scenario, and the restrictive stock agreement in Dickinson is perhaps unusual in that it required the company to purchase if the shareholder was required to surrender his stock, i.e., not merely a right of first refusal.

redemption, right? (pls. disregard if this has been approached and I'll go back later, sorry if that's the case).	In the more typical arrangement you are describing, it may be that everyone understands the issuing corporation will in fact step in, but there is usually no requirement that they do.
What does the donor lose if audited and deemed pre-arranged? Pay the capital gains tax? Lose the FMV deduction? Both?	Hope that you are well. Gains tax phantom (they no longer have the asset)- still get the FMV deduction.
So, couldn't the charity just market the property for a longer period of time in looking for a buyer?	In general, yes, that is the better practice. But sometimes a buyer who has already been identified will disappear if they cannot close promptly.
What if the charity has found an independent buyer for donated real estate and has an agreement from the buyer that they are obligated to buy if the charity requests?	This is actually a good model if you can implement it. A put option, if you will. The result is that the charity does have a ready buyer, but does not acquire the property under an existing obligation to sell.
Can a community foundation receiving a gift of closely held business interest into a DAF agree to a lock up, scheduled sale, or other inside shareholder requirements that would go into effect when the company goes public?	Generally yes, so long as the charity is being treated EXACTLY the same way as all other similar class of shareholders. A right of first refusal or a call provision can be dicey, or things like "all the other shareholders will get cash and you will get some rollover stock that you can't sell."
In your scenario, Bryan, doesn't the charity receive the money the donor would otherwise have received, meaning that the donor can no longer tap that source of cash if the gain becomes taxable to the donor?	Correct - that is the "phantom" aspect as you know. But, at least for us, probably 75% of our donations are not the entire interest so they would still have some other proceeds. But they would hopefully know this risk going in and would plan accordingly.
Our more common donation is real estate, as opposed to closely held business interests. **Can you help connect the dots a little better as to how the conclusions in the cases Russ is discussing about businesses may relate to real estate transactions? Is that where the**	All the same framework would apply, but the typical real estate contingencies can create some other noise. Generally, most aren't comfortable moving forward after a purchase and sale contract is signed. Most importantly, who is legally signing the listing agreement/sales contract, etc.? If it is

more than 50% guideline comes in? Is there any clarity as to the type of contingencies in a signed real property sale contract that would equate to less than 50% certainty?	the donor, that is not good optically. But each donation is based on its unique facts and circumstances. Also, I don't know that 50.1% is necessarily a number that will kill the deal. The language some of the courts have been using is "practically certain" to occur, which sounds like some number north of maybe 85%.
How about ESOP transactions that have more complexity and concurrent closing issues? Any other things that the charity can do to create that clearance?	The Tax Court memo decision in Chrem, which we mentioned briefly, is worth some study here. A contribution of closely held stock to a charity, followed by a sale into the ESOP, is a fairly common planning maneuver, but Chrem raises some interesting questions about pre-arrangement, mostly centered on timing. The decision does not actually resolve these questions, however, though it did appear the court was willing to hear a "practically certain" argument from IRS. Instead, the parties settled.
However, courts have clearly stated that the funds of a DAF are the DAF sponsor's money and therefore have the right to deny a grant recommendation by the donor/advisor to the DAF. So, if the charity decides to go against, the precatory language, the charity is on solid legal ground.	And note that it is literally a requirement for deductibility of a contribution to a DAF, per Code section 170(f)(18), that the contemporaneous written acknowledgment include an express statement that the fund sponsor "has exclusive legal control over the assets contributed."

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